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No. 88-901

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

CLYDE ADAMS, Petitioner

v.

MARY ANN VANDEMARK, Executive Director, and HUMAN DEVELOPMENT COMMISSION, a Michigan not-for-profit Corporation, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED FOR REVIEW	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
CONCISE STATEMENT OF THE CASE	2
Defendant, HDC	4
The Evidence	6
Ruling Below	10
REASONS GRANTING OF WRIT SHOULD BE DENIED	11
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:	Page
Adams v. Vandemark, No. 87-1096 (6th Cir. 1988)	18, 20, 25
Blum v. Yaretsky, 457 U.S. 991 (1982)	3,
Braden v. University of Pittsburg, 552 F.2d 948 (34d Cir. 1977)	12, 13, 17
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	11,13,18,23
Griffith v. Bell-Whitley Community Action Agency, 614 F2d 1102 (6th Cir. 1980)	18,
Krynicky v. University of Pittsburg, 742 F.2d 94 (3rd Cir, 1984)	12,13,18,20, 25
Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982)	13,17,20,21, 22
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	13,
Constitution:	
First Section of 14th Amendment to United States Constitution	2
Statutes:	
42 USC §1983	1, 2, 3

QUESTION PRESENTED FOR REVIEW

Whether state action is involved under 42 USC §1983 where a Village government, one of many municipalities located within the four-county area served by the Human Development Commission, enters into a contract with a community action agency which is a non-profit corporation which occupies under a lease arrangement a building owned by the Village which was an acquired vacant building needed by the Village for its own development several years in the future, which building was rennovated and remodeled by the agency; and where by virtue of the lease the Village is able to draw upon the non-profit corporation's grant application abilities to receive a Federal Block Grant for housing rehabilitation in the Village after which the Village contracted with a non-profit corporation to use its staff to administer the Federal Block Grant Program; where

that agency while administering the Federal Block Grant for the Village fired Petitioner for good and proper cause under its personnel policies but which reasons are alleged to be in violation of Petitioner's 14th Amendment rights.

OPINION BELOW

The August 24, 1988, Opinion of the Court of Appeals whose Judgment is sought to be reviewed by Petitioner is reprinted in the separate appendix attached to Petitioner's Petition.

JURISDICTION

See Petitioner's Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Petitioner's Petition.

CONCISE STATEMENT OF THE CASE

This is a section 1983 case initially filed in Federal District Court in 1982 alleging deprivation of First Amendment rights. The court had jurisdiction under

28 USC §1343. The case was tried before a jury which returned a verdict for Petitioner totaling $125,000. On appeal the judgment of the trial court was initially affirmed but on reconsideration the Court of Appeals vacated its first opinion, determined that the jury instructions were inadequate and reversed. Upon remand Defendants moved for summary judgment on the original pleadings, supplemented by the evidence produced at trial, and the District Judge to whom the case was remanded granted the motion, finding that Defendants did not act under color of law. Petitioner appealed the Order of the District Court. On August 24, 1988, the Court of Appeals entered a Judgment affirming the order of the district court in an opinion written by Judge Cornelia G. Kennedy, concurred in by Chief Judge Albert J. Engle. Judge Gilbert S. Merritt wrote a dissenting opinion.

Defendant, Human Development Commission

Defendant Human Development Commission (HDC) is a Michigan non-profit corporation.

HDC became a non-profit corporation in 1965 and acted as a Community Action Agency under the provisions of Title II of the Economic Opportunity Act of 1962, the Fed-deral statute. Subsequently, the Economic Opportunity Act of 1962 was repealed in 1981 and pursuant to the Economic and Social Opportunity Act of 1981 Michigan created the Bureau of Community Services within the State Department of Labor. This Act granted grandfather statute to com-munity action agencies which were pre-previously part of the Federal program.

Accordingly, HDC was recognized as a Community Action Agency by the Bureau of Community Services under the grandfather clause under the Act adopted by Michigan in 1982. Mich. Comp. Laws Ann. §400.1108 (3). This act did not take effect until January 12, 1982

Accordingly, HDC and the Village of Caro entered into a lease on July 1, 1980, for a ten-year term subject to two successive ten-year rights of renewal providing HDC had in good faith reasonably complied with all the terms, conditions and covenants of the lease. The lease required HDC to pay $1.00 in rent annually, to assist the Village in grant writing in technical information needed within reasonable limits, to make substantial repairs and improvements in the leased premises which would become the sole property of the Village, to pay all utilities and services on the leased premises, to cover the Village for liability insurance and fire insurance, to make all reasonable repairs and alterations and to not sublease. (Plaintiff's Ex. 24, JA 453).

Separately and distinctly the Village contracted with HDC to administer its Community Block Grant Program. At all times the Village kept the funds under its

The Evidence

In 1979 the Village of Caro acquired some buildings within the Village of Caro that had been occupied by a business that closed down. The Village felt that the property would be valuable in the future to expand the public works department for other Village operations. It was interrested in the property for the future. (JA 76).

The Village entered into discussions with HDC in 1979 concerning the submission of a pre-ap grant application for a Community Development Block Grant. The pre-ap was sent in and approved and the Village was invited to make a full appplication which they did in the spring of 1980. (JA 70, 71, 72).

HDC had offices which they rented in the Village of Caro but which the landlord desired to modify and obtain new tenants.

possession and control and earned interest on funds on hand from the grant to the tune of about $30,000.00 (JA 92) and reserved the right under its contract with HDC to terminate it at any time by giving 30 days notice. (JA 435).

In 1980 Petitioner Clyde Adams was hired by HDC to be a crew leader in rennovation of the office buildings. In 1981 that job was completed and he applied for a new position, that of spec writer for the rehabilitation of homes. He was offered the position on June 22, 1981, with a starting date of July 6, 1981. (JA 452). Since this was a new position he was subject to a probationary period under the personnel policies.

Although his work as a crew leader for the rennovation of a building was satisfactory, problems developed in his new position. He was given the opportunity to become a certified energy auditor under a program that could have assisted him in

obtaining a substantially better job. He refused. (JA 328 - 332).

Documentation in his personnel file shows subsequent acts of insubordination, for example, failure to make appointments with clients to be sure they were home before making inspections on the premises, thereby frequently driving to client's homes only to find them not there (JA 351, 352), failure to cooperate in performing jobs outside of the spec writer position when it was necessary for HDC personnel to perform a number of tasks because of a shortage of help and for an accumulation of reasons unrelated to the allegations concerning a builders license Mr. Adams was terminated on December 7, 1981. (JA 461).

Public utility companies in Michigan in cooperation with the Public Service Commission developed a program called the Residential Conservation Program which consisted of a free energy conservation analysis for consumers. A list of

contractors was published in each County indicating they were available to make the building improvements recommended by the analysis. The HDC participated in some of these jobs and with a weatherization program, neither of which required that the agency have or operate under a builders license. (JA 343).

Expansion of this area was a possibility with a builders license and this was discussed with Mr. Adams who held a builders license and who originally agreed to work with the HDC but subsequently changed his mind which was his right to do and this action was not a basis for his discharge.

Petitioner's Complaint to the District Court indicated that he sought the advice of counsel concerning the use of his builders license and when his counsel contacted HDC, they fired him. When the proofs at trial showed that in fact HDC had not heard from his counsel prior to the firing, Petitioner's theory was changed. In fact, there

were no bids on any jobs by HDC in 1981 that required a builders license and there were no jobs performed in 1981 that required a builders license. (JA 346). His suit was in fact unfounded as he was terminated for proper reasons under the personnel policies.

The Rulings Below

Petitioner Clyde Adams prevailed at the trial of the matter and a judgment against Defendants totaling $125,000 was entered. On appeal the Court of Appeals initially affirmed the judgment in an opinion dated December 19, 1985. On reconsideration the Court of Appeals vacated its previous order, determined the trial instructions with respect to 'color of law' were inadequate and reversed in an opinion dated March 27, 1986. Upon remand the district court granted Defendants' motion for summary judgment on the issue of 'color of law', finding as a matter of law that no state action was involved.

Upon appeal the majority of the panel of the Court of Appeals agreed with the district court and held that Petitioner failed to establish facts sufficient to constitute color of law. Circuit Judge Merritt dissented.

REASONS GRANTING OF WRIT SHOULD BE DENIED

Petitioner States That Certiorari Should Be Granted To Resolve Conflicts in Principle Among The Courts Of Appeal.

Petitioner claims the Opinion of the Sixth Circuit Court of Appeals to be fundamentally at variance with the position taken by the Third Circuit Court of Appeals in cases of this nature. A review of the position of the Third Circuit under the facts of the case referred to by Petitioner will find it not to be at odds with the Sixth Circuit.

In **Burton v. Wilmington Parking Authority**, 365 US 715 (1961) this Court found state action where there was a symbiotic relationship between the actor and the state. State action exists when:

> "The State has so far insinuated itself into a position of interdependence with ... [the acting party] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." id. p. 725.

The Third Circuit applied the reasoning of Burton to hold that the University of Pittsburg acted under color of law when it discharged an employee. **Braden v. University of Pittsburg,** 552 F.2d 948 (3rd Cir. 1977). The Court "concluded that Pennsylvania had so far insinuated itself into a position of interdependence with the University of Pittsburg that there was a symbiotic relationship between the two, and ... therefore held that the actions of the University could fairly be attributed to the state for purposes of satisfying the state action requirement of section 1983." **Krynicky v. University of Pittsburg,** 742 F.2d 94, 99 (3rd Cir. 1984), **cert denied** 105 S. CT. 2018.

After **Braden v. University of Pittsburg** had been decided, this Court announced a series of cases referred to as the **Lugar** trilogy, **Rendell-Baker v. Kohn**, 457 U.S. 830 (1982); **Blum v. Yaretsky**, 457 U.S. 991 (1982); and **Lugar v. Edmondson Oil Co., Inc.**, 457 U.S.922 (1982).

Following this, the Third Circuit again had before it a case arising under section 1983 against the University of Pittsburg wherein the district court had granted summary judgment against the Plaintiff on the theory that the **Lugar** trilogy overrulled or, at a minimum, limited **Burton** to its facts. With the issue framed in this matter, the Third Circuit reversed the judgment of the district court and remanded the matter for trial. **Krynicky v. University of Pittsburg**, 742 F.2d 94 (3rd Cir. 1984) cert. denied 105 S. Ct. 2018). The Third Circuit addressed specifically the argument--

"that **Blum** and **Rendell-Baker** preclude the finding of a symbiotic relationship unless it can be shown that the state benefits financially from the activities of the defendant. Such a financial relationship was present in the **Burton** case, but was not proved in **Braden**, and was not, the defendants contend, demonstrated here. Thus, the defendants argue that although **Burton** may still be good law after the **Lugar** trilogy, **Braden** has implicitly been overruled and we should find that there is no symbiotic relationship in the cases of Pitt and Temple.

It is true that the Supreme Court in **Blum** and **Rendell-Baker** focused on the financial relationship between the defendants and the State, but that was because the financial relationship was the only significant form of state influence over the defendants in those cases. The Court concluded that merely proving the existence of the limited type of financial relationship present in those cases was not sufficient to establish the requisite symbiotic relationship. By way of contrast, the Court in **Burton** emphasized the complete intermingling of state and private actions that were present in the case as grounds for its

conclusion that a symbiotic relationship existed. The court referred to the fact that the state-owned Parking Authority financially benefited from renting the coffee shop, but the Court also emphasized that the coffee shop was located in a building owned and operated by the state. It is apparent from the opinion that this second factor is at least as important as the financial relationship.

The Commonwealth's interelationship with Pitt and Temple is these cases is more closely analogous to the complete intermingling of state and private actors found in **Burton** than to the relatively minimal interrelationship between the State and the defendants in **Blum** and **Rendell-Baker**. An examination of the statutes that create and define the Commonwealth's relationship with Pitt and Temple demonstrates this fact...

To begin with, the statute was enacted to save the Commonwealth the expense of creating an additional state college. In addition, the statute changes the name of the University of Pittsburgh to "The University of Pittsburgh-Of the Commonwealth System of Higher Education...Consonant with this linkage, the legislature declares it to be the purpose of the Act to extend the opportunities for higher education in

the Commonwealth 'by establishing University of Pittsburgh as an **instrumentality** of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education.'...

.. In the cases of Pitt and Temple, to the contrary, the issue is not whether the level of state contributions has reached a magic figure necessary to effect this transformation, but rather the affirmative state act of statutorily accepting responsibility for these institutions. This fact, above all, marks the difference between these two institutions and those discussed by the Supreme Court in **Rendell-Baker** and **Blum**.

In addition, unlike the school in **Rendell-Baker** and the nursing home in **Blum**, Temple and Pitt are not merely private contractors with the state. Not only do they receive present financial support, but also the state has committed itself to future financial aid and sets an annual appropriation policy and tuition rate. There is nothing to indicate that the state could not discontinue its support of the New Perspectives School or the American Nursing Home at any time by the simple means of not renewing their contracts. By contrast, it would require a legislative enactment to disentangle Temple and Pitt from the Commonwealth, and the idea that legislative appropriations to these institutions might be severely curtailed is unrealistic... Temple and Pitt are not merely "private contractors performing

> services for the government," **Rendell-Baker**, 457 U.S. at 843, 102 S.Ct. at 2772; they not only receive funding and are subject to routine state regulations, but are instrumentalities of the state, both in name and in fact...
>
> ...Therefore, we are bound by Third Circuit precedent to hold that a "symbiotic relationship" exists between the Commonwealth of Pennsylvania on the one hand and Pitt and Temple on the other. Actions taken by these two institutions are, therefore, actions taken under color of state law and are subject to scrutiny under section 1983. Consequently, we will reverse the judgment of the district court in **Krynicky v. University of Pittsburg** and affirm the judgment of the district court in **Schier v. Temple University**, and will remand both cases for further proceedings consistent with this opinion." **Krynicky v. University of Pittsburg**, p.101-103.

Thus, the Third Circuit adequately reviewed the **Lugar** trilogy in considering whether or not **Braden** had been overruled and correctly determined that the University of Pittsburg is in fact "acting under color of state law" in its actions challenged under Section 1983 as a matter of law.

The Sixth Circuit likewise does not believe that **Burton** has been overrulled. It would have made a similar finding under the facts of **Krynicky**.

The Sixth Circuit in deciding **Adams v. Vandemark**, No. 87-1096 (6th Cir. 1988) jointly decided **Panknin v. Vandemark**, No. 86-2034 (6th Cir. 1988). The Adams case arose while HDC existed pursuant to the Federal Act, while the **Panknin** case arose while HDC existed in the presence of the Michigan Act. In both instances HDC was a non- profit corporation and in both cases the Sixth Circuit arrived at the same results.

The Sixth Circuit in **Griffith v. Bell-Whitley Community Action Agency**, 614 F2d 1102 (6th Cir 1980); **cert denied** 447 US 928 reviewed a "symbiotic relationship" theory between the Defendant and the Federal government. In that case the Defendant was a non-profit Community Action Agency funded by the Federal government to

develop programs to eliminate poverty. Several former employees alleged a violation of their First and Fifth Amendment rights in the agency's refusal to call them back after a lay-off because of support for the election of a certain individual as agency executive director. In rejecting the "symbiotic relationship" theory, the Court said:

> "Thus, apart from its interest in seeing that a federal grant is actually used for its intended purpose, the government has no vested interest in the success or even the continued existence of any particular community action agency."

614 F 2d at 1109. Next turning to the question of a "nexus" between the government regulations and the private conduct, the court noted:

> ".. the decision as to who should be terminated was left to the agency ... [t]he regulations are not concerned with the details of the day-to-day operations of the agencies..."

614 F 2d at 1109. Because the federal regulations did not encourage or enforce the allegedly discriminatory lay-offs and terminations, no federal action was found.

The Petitioner, through his counsel, has conceded that he does not meet the "nexus" test (JA 52) and has conceded that not all the conduct of HDC is state action. (JA 49). Accordingly, contrary to the finding in **Krynicky** there is no symbiotic relationship as a matter of law in **Adams v. Vandemark** and the Sixth Circuit properly had to evaluate the **Lugar** trilogy and **Burton** to determine based on the facts in Adams whether or not a symbiotic relationship could be found. Judge Kennedy succinctly stated the question posed:

> "The ultimate issue in determining whether a person is subject to suit under §1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" **Rendell-Baker v. Kohn**, 457 U.S. 830, 838 (1982) (citation omitted). Phrased another way, "a State normally can be held responsible for a private decision only when it has

> exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." **Blum v. Yaretsky**, 457 U.S. 991, 1004 (1982).

Judge Kennedy then stated the Plaintiff's position:

> "The plaintiffs allege four links between HDC and the state: public funding, government regulation, public facilities, and public officials on HDC's board. These links, the plaintiffs assert, demonstrate a symbiotic relationship between HDC and the state. All of these links have been addressed by previous cases.

She then proceeded to analyze each separate claim based on the **Lugar** trilogy and recent Sixth and Seventh Circuit Opinions and concluded that the Plaintiffs failed to state a claim under Section 1983 and that the district court properly dismissed the suits. Judge Kennedy

> exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." **Blum v. Yaretsky**, 457 U.S. 991, 1004 (1982). **Adams v. Vandemark** No. 87-1096 (6th Cir. 1988) p. 3

Judge Kennedy then stated the Plaintiff's position:

> "The plaintiffs allege four links between HDC and the state: public funding, government regulation, public facilities, and public officials on HDC's board. These links, the plaintiffs assert, demonstrate a symbiotic relationship between HDC and the state. All of these links have been addressed by previous cases. **Adams v. Vandemark** p. 7.

She then proceeded to analyze each separate claim based on the **Lugar** trilogy and recent Sixth and Seventh Circuit Opinions and concluded that the Plaintiffs failed to state a claim under Section 1983 and that the district court properly dismissed the suits. Judge Kennedy

specifically distinguished **Burton** based on the facts of this case:

> "We distinguish **Burton**. The Supreme Court's finding of state action in **Burton** was based in part upon the fact that the city leased the restaurant space for its business, and construction, repairs, and maintenance of the property were made from public funds. 365 U.S. at 713-14. The Court found that by virtue of the lease the "profits earned by discrimination not only contribute to, but are indispensable elements in, the financial success of a governmental agency," **Id.** at 724. Neither of the plaintiffs in the case at bar has alleged that Caro has benefited from their discharges through the leasing of office space to HDC."— **Adams v. Vandemark**, p. 9.

Judge Kennedy correctly analyzed the situation of HDC as it existed in each of the cases before her and came to the correct conclusions. Petitioner relies almost entirely upon the dissenting opinion of Judge Merritt and incorrectly states the facts in an attempt to further justify Judge Merritt's dissenting opinion. For example, the leasing of the Village facilities is a straight-forward contract between the Village of Caro and HDC whereby each party benefits. The primary term of the lease is ten years not 30 and improvements were made from a grant in the sum of $30,000.00 (not $270,000) which was approximately equal to interest earned by the Village on the grant funds while they held them.

There was an entirely separate contract to administer a Community Development Block Grant for which HDC was to be paid for its administration services while at all times the Village of Caro had complete

control of the project, kept in their possession and disbursed all funds and had the right to terminate HDC's administration contract upon 30 days notice.

Adams was hired strictly by the HDC and he was dismissed under their personnel policies. The Village had no say in the hiring or firing of HDC employees and had no concern one way or the other who was hired as they had a right to terminate the administration contraact with HDC at any time for any reason and what HDC did or did not do with its employees was of no concern to the Village and of no consequence to them one way or the other.

A fair reading of the two opinions discussed above, **Krynicky v. University of Pittsburg**, a Third Circuit decision, and **Adams v. Vandemark**, a Sixth Circuit decision, reveals no conflict in principle whatsoever based on the facts of the respective cases. From a fair reading of

these two cases one cannot conclude that the Federal law is not being administered uniformly in our system.

Certiorari Need Not Be Granted To Clarify Or Redefine The Concept of State Actions.

Although it is true that Courts throughout the land struggle with the concept of "state action" and "under color of law", there is nothing in this case which would justify this Court in using it as a vehicle to either clarify the concept or to further confuse the concept and it is strongly urged that the Court deny this Petition.

CONCLUSION

Wherefore, Respondent respectfully prays that a writ of certiorari be denied.

Respectfully submitted

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